

STATE WATER RESOURCES CONTROL BOARD  
RESOLUTION NO. 2001 – 059

RESOLUTION ADOPTING PERMANENT REGULATIONS SPECIFYING PROCEDURES  
FOR THE SELECTION OF PRIVATE ARCHITECTURAL, LANDSCAPE  
ARCHITECTURAL, ENGINEERING, ENVIRONMENTAL, LAND SURVEYING, OR  
CONSTRUCTION PROJECT MANAGEMENT FIRMS

WHEREAS:

1. Section 4526 of the Government Code requires state agencies to adopt by regulation procedures for the selection of private architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms.
2. Pursuant to section 25299.36 of the Health and Safety Code or section 13304 of the Water Code, a Regional Water Quality Control Board (RWQCB) at any time may need to contract with a private professional services firm for corrective action to address a situation which requires prompt action to protect human health or the environment or to prevent substantial pollution, nuisance, or injury to any waters of the state.
3. To process pending water rights applications and petitions for change in a water right permit, the Division of Water Rights at the State Water Resources Control Board (SWRCB) needs to contract with private professional services firms to prepare environmental documents required by the California Environmental Quality Act.
4. Existing emergency regulations that satisfy the statutory procedural requirements and enable the SWRCB and RWQCBs to enter contracts with private professional services firms will expire on 6/16/01, unless the SWRCB submits to the Office of Administrative Law the proposed permanent regulations, the rulemaking record, and a certificate of compliance before that date.
5. The SWRCB published a Notice of Proposed Rulemaking on March 16, 2001.
6. The 45-day public comment period closed on April 30, 2001.
7. The proposed permanent regulations generated few public comments and the SWRCB did not receive a request for a hearing. The SWRCB has considered the public comments and responded to them in the Final Statement of Reasons. No revisions to the proposed permanent regulations are necessary in light of the public comments received.

THEREFORE BE IT RESOLVED THAT:

The provisions of Title 23, California Code of Regulations, Division 3, Chapter 29, sections 3870 to 3880 are adopted and the Executive Director is authorized to transmit the proposed permanent regulations to the Office of Administrative Law for filing with the Secretary of State.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 17, 2001.

/s/

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Maureen Marché  
Clerk to the Board

CALIFORNIA CODE OF REGULATIONS

TITLE 23. WATERS

DIVISION 3. STATE WATER RESOURCES CONTROL BOARD

**Chapter 29. “Contracting with Private Architectural, Landscape Architectural, Engineering, Environmental, Land Surveying, or Construction Project Management Firms”**

**§ 3870. Definitions.**

As used in this chapter:

- (a) “Architectural, landscape architectural, engineering, environmental, and land surveying services,” “construction project management,” and “environmental services” have the same meaning as defined in Section 4525 of the Government Code.
- (b) “Board” means either the State Water Resources Control Board or a California Regional Water Quality Control Board.
- (c) “Disabled veteran business enterprise” has the same meaning as defined in Section 999 of the Military and Veterans Code.
- (d) “Emergency” has the same meaning as defined in Section 1102 of the Public Contract Code.
- (e) “Firm” means an individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture, landscape architecture, engineering, environmental services, land surveying, or construction project management.
- (f) “Small business firm” has the same meaning as defined in Section 14837 of the Government Code.

Authority: Section 4526, Government Code.

Reference: Sections 4525-4529.10, and 14837, Government Code; Section 999, Military and Veterans Code; Section 1102, Public Contract Code.

**§ 3871. Establishment of Criteria.**

- (a) Each time the board intends to contract with a firm for a service identified in Section 3870, subdivision (a), the board shall utilize the following criteria for selecting a firm:
- (1) the firm's professional experience in performing similar services;
  - (2) the quality and timeliness of the firm's recently completed or ongoing work;
  - (3) the firm's reliability, continuity, and location;
  - (4) the firm's staffing capability;
  - (5) the education and experience of key personnel the firm intends to assign to the contract;
  - (6) the firm's knowledge of applicable regulations and technology associated with the services required; and
  - (7) other factors the board deems relevant to the specific task to be performed.
- (b) The board shall weigh the factors identified in subdivision (a) according to the nature of the proposed project, the complexity and special requirements of the specific project, and the needs of the board.

Authority: Section 4526, Government Code.

Reference: Sections 4526, 4527, 4529.5, and 4529.12, Government Code.

**§ 3872. Announcement.**

- (a) The board shall publish a statewide announcement of the proposed project.
- (b) In addition to the announcement specified in subdivision (a), the board may publish an annual statewide announcement requesting the submittal of qualifications from firms wanting to be included on regional lists of potentially available firms.
- (c) An announcement issued pursuant to subdivision (a) or (b) shall be published in the California State Contracts Register, in accordance with title 2, division 3, part 5.5, chapter 6 of the Government Code (commencing with Section 14825), and in at least one print or electronic publication of an appropriate professional society. Failure of a professional society to publish the announcement shall not invalidate a contract. In addition to these publications, an announcement issued pursuant to subdivision (a) shall be sent to firms on current applicable annual regional lists, if any.

- (d) The board may maintain a mailing list of firms that have requested announcements issued pursuant to subdivisions (a) or (b) and published pursuant to subdivision (c). The board may provide copies of announcements to those firms. Failure of the board to send a copy of an announcement to a firm shall not invalidate a contract.
- (e) An announcement issued pursuant to subdivision (a) shall contain the following information:
  - (1) a description of the work to be performed;
  - (2) the criteria upon which the award will be based;
  - (3) submittal requirements and deadlines; and
  - (4) the name and phone number of a person to contact for further submittal information.
- (f) An announcement issued pursuant to subdivision (b) shall contain the following information:
  - (1) a request for a statement of qualifications and performance data;
  - (2) a description of the type of services that the statement should address;
  - (3) an explanation of how the information will be used to hire firms, including geographical limitations and expiration dates;
  - (4) submittal requirements and deadlines; and
  - (5) the name and phone number of a person to contact for further submittal information.
- (g) The board shall endeavor to identify potentially qualified small business firms interested in contracting with the board, and shall provide copies of the announcements to those small business firms that have indicated an interest in receiving the announcements. Failure of the board to send a copy of an announcement to a firm shall not invalidate a contract.

Authority: Section 4526, Government Code.

Reference: Sections 4526, 4527, and 4529.12, Government Code.

### **§ 3873. Selection of Qualified Firms.**

- (a) After the final response date stated in the announcement issued pursuant to Section 3872, subdivision (a), the board shall review the written responses to the

announcement together with statements of qualifications submitted by firms on the current applicable annual regional list, if any, for the region in which the contract will be performed. The board shall evaluate submissions using the selection criteria contained in the announcement issued pursuant to Section 3872, subdivision (a). The board shall rank, in order of preference based on the criteria set forth in the announcement, the firms determined to be qualified to perform the required services.

- (b) The board shall conduct interviews with no fewer than the three highest ranked firms to discuss qualifications and methods for furnishing the required services.
- (c) From the interviewed firms, the board shall select, in order of preference, no fewer than three firms determined to be the most highly qualified to perform the required services.
- (d) In the event the board concludes that there are fewer than three firms determined to be qualified to perform the required services, the board may proceed by interviewing all the firms determined to be qualified. Failure of the board to interview three firms shall not invalidate a contract if the board interviews all firms that the board determines to be qualified to perform the required services.

Authority: Section 4526, Government Code.

Reference: Sections 4526, 4527, and 4529.12, Government Code.

#### **§ 3874. Estimate of Value of Services.**

- (a) Before interviewing a firm, the board shall prepare an estimate of the value of the proposed project based upon accepted rates for comparable services. The estimate shall serve as a guide during contract negotiations to evaluate a fair and reasonable compensation.
- (b) If at any time the board determines its estimate to be unrealistic due to changing market costs, special conditions, or other relevant considerations, the board shall reevaluate and modify the estimate as necessary.
- (c) The board's estimate shall remain confidential until the award of the contract or abandonment of any further procedure for the services to which it relates.

Authority: Section 4526, Government Code.

Reference: Sections 4526, 4526.5, 4528, and 4529.12, Government Code.

#### **§ 3875. Contract Negotiation.**

- (a) The board shall implement the following procedure to negotiate fees and execute a contract:
  - (1) notify the successful firm of its selection;
  - (2) provide the firm with written instructions for the ensuing negotiations;
  - (3) begin negotiations within 14 days of the firm's receipt of selection notification or upon receipt of the firm's cost proposal or, if additional time is necessary, notify the firm of a later negotiation date;
  - (4) if an agreement is successfully negotiated, the board and the firm shall proceed to execute a contract so that the board may complete the contract within 45 days of the date the contract is signed by the board and the firm. The board shall notify the firm if additional time is necessary to complete the contract.
- (b) The board shall attempt to negotiate a satisfactory contract with the firm most highly qualified to perform the required services, as selected according to Section 3873, at a compensation that the board determines is fair and reasonable. If the board is unable to negotiate a satisfactory contract, the board shall terminate negotiations with that firm. The board shall then proceed in the same manner with the other firms selected according to Section 3873, in the selected order.
- (c) If the board is unable to negotiate a satisfactory contract with a selected firm, the board may make additional selections from the qualified firms, as provided for in Section 3873, and continue the negotiation process or may terminate the negotiation process.
- (d) If the board is unable to negotiate a satisfactory contract with a qualified firm, the board shall abandon the negotiation process for the required services.

Authority: Section 4526, Government Code.

Reference: Sections 4526, 4526.5, 4528, and 4529.12, Government Code; Section 6106, Public Contract Code.

### **§3876. Statewide Participation Goals.**

Upon execution of a contract, unless waived by the board, the firm must meet the statewide participation goal of not less than three percent for disabled veteran business enterprises or demonstrate that a good faith effort was made to meet the goal, in order to comply with the statewide participation goals as required by Title 2, California Code of Regulations, sections 1896.60-1896.64.

Authority: Section 4526, Government Code.

Reference: Section 4528, Government Code; Sections 999, 999.2, and 999.3, Military and Veterans Code; Sections 10115, 10115.1, and 10115.2, Public Contract Code; *Monterey Mechanical Co. v. Wilson* (9<sup>th</sup> Cir. 1997) 125 F.3d 702, 706, fn.5, rehearing denied (1998) 138 F.3d 1270.

**§ 3877. Contract Amendments.**

If the board determines that a change in the contract is necessary during performance of the contract, the parties may amend the contract, by mutual consent, in writing, and make a reasonable adjustment in the firm's compensation.

Authority: Section 4526, Government Code.

Reference: Sections 4526, 4528, and 4529.12, Government Code.

**§ 3878. Contracting in Phases.**

The board is not required to negotiate the total contract compensation provision when the contract is initially executed pursuant to Section 3875, subdivision (a)(4), if the following conditions are satisfied:

- (a) the board determines it is necessary or desirable for a project to be performed in phases;
- (b) the board determines that the firm is the most highly qualified to perform the entire project at a fair and reasonable price, excluding from consideration firms with whom negotiations have been terminated pursuant to Section 3875, subdivision (b); and
- (c) the contract between the board and the firm provides that the board has an option to use the firm for other phases of the project and that the firm will accept a fair and reasonable price to be later negotiated in accordance with this chapter and reflected in a subsequent written instrument.

Authority: Section 4526, Government Code.

Reference: Sections 4526, 4526.5, 4528, and 4529.12, Government Code. Section 6106, Public Contract Code.

**§ 3879. Prohibited Practices.**

- (a) A board employee shall not participate in the selection process if the employee has a relationship, as specified in Section 87100 of the Government Code, with a firm seeking a contract subject to this chapter.

- (b) The board shall require a contract entered pursuant to this chapter to include a provision in which the firm warrants that the contract was not obtained through rebates, kickbacks, or other unlawful considerations either promised or paid to a board employee. Failure to adhere to the warranty may be cause for contract termination and recovery of damages under the rights and remedies due the board under the default provision of the contract.
- (c) Nothing in this chapter shall be construed to abridge the obligation of the board or the firm to comply with all laws regarding political contributions, conflicts of interest, or unlawful activities.

Authority: Section 4526, Government Code.

Reference: Sections 4526, 4529.12, and 87100, Government Code.

**§ 3880. Application of Chapter.**

- (a) This chapter shall not apply when the board determines that the needed services are technical in nature, require little professional judgment, and it is in the public interest to require competitive bids.
- (b) This chapter shall not apply when the board determines that these procedures are not required because an emergency condition exists.

Authority: Section 4526, Government Code.

Reference: Sections 4526 and 4529, Government Code; Section 1102, Public Contract Code.